(13)

Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1076

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellant,

vs.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE APPELLEE THE STATE OIL & GAS BOARD OF MISSISSIPPI

EDWIN LLOYD PITTMAN, Attorney General
State of Mississippi
ED DAVIS NOBLE, JR.
Assistant Attorney General
(Counsel of Record)
R. LLOYD ARNOLD
Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

Attorneys for the State Oil and Gas Board of Mississippi

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

BEST AVAILABLE COPY

2017

QUESTIONS PRESENTED

I.

When the price of certain natural resources was deregulated as provided by the Natural Gas Policy Act of 1978, 15 U.S.C. § 3431(a)(1)(B)(i), did the Mississippi Oil and Gas Board have the authority to impose its Regulations (Rule 48) to prevent waste and drainage and to protect the rights of the correlative owners in a designated pool or source of supply.

II.

Whether the "ratable take" provisions of Rule 48 of the State Oil and Gas Board of Mississippi creates an impermissible burden on interstate commerce, or alternatively, whether pursuant to the balancing of interests test announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the State may reasonably regulate the allocation of its natural resources to prevent waste and drainage.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

BRIEF FOR THE APPELLEE, THE STATE OIL AND GAS BOARD OF MISSISSIPPI 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. When the Price of Certain Natural Resources Was Deregulated As Provided by the Natural Gas Policy Act of 1978, 15 U.S.C. § 3431(a)(1)(B)(i), the Congress Ceded to the States, and in This Instance Mississippi, the Authority to Impose Its Regulations (Rule 48) to Prevent Waste and Drainage and to Protect the Rights of the Correlative Owners, Operators or Producers in a Designated Pool and/or Drilling Unit 7

II. The "Ratable Take" Provision of Rule 48 of the Oil and Gas Board of Mississippi Does Not Impede Interstate Commerce Because Its Operation Is Reasonably Calculated to Protect a "Legitimate Local Interest" - Fairness, That Is, to Insure an Appropriate Share for Each Correlative Owner, Operator or Producer 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Black v. Cutter Laboratories, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956) 8

California Company v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542 (1946) 1

Energy Reserves Group, Inc. v. Kansas Power & Light Company, 459 U.S. 400, 419, 102 S.Ct. 697, 74 L.Ed.2d 569, 586 (1983) 14

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc. ..... U.S. ..... (No. 83-1925, 53 U.S.L.W. 4612, June 3, 1985) 6, 11, 12

Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts, ... U.S. ..... (Nos. 84-325 and 84-326, 53 U.S.L.W. 4616, June 3, 1985) 6, 12

Mississippi University for Women v. Hogan, 458 U.S. 718, 723, 102 S.Ct. 331, 78 L.Ed.2d 1090 (1984) 8

Northern Natural Gas Co. v. State Corporation Commission of Kansas, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963) 6

Ohio Oil Co. v. Indiana, 177 U.S. 190, 202-211, 10 S.Ct. ....., 44 L.Ed. 729, 736-740 (1900) 5, 13

Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, 192, 71 S.Ct. 221, 222, 95 L.Ed. 204, 205-206 (1950) 5

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) .....I, 4, 5, 7, 12

Transcontinental Gas Pipeline v. State Oil and Gas Board, 457 So.2d 1298 (1984) 3, 4, 7, 8, 13, 14

Other Authorities

15 U.S.C. § 3431(a)(1)(B)(i) 1, 6, 15
15 U.S.C. § 3431(c) 7, 15
15 U.S.C. § 3317(c)(1) 2, 4, 6, 8, 15
Chapter 117, §§ 1-48, Mississippi Laws of 1932 1
Chapter 256, Mississippi Laws of 1948, § 53-1-5, Mississippi Code of 1972 (Supp. 1983) 1
Chapter 301, Mississippi Laws of 1970, § 53-1-17, Mississippi Code of 1972 2
Chapter 365, Mississippi Laws of 1972, § 53-3-101, *et seq.*, Mississippi Code of 1972 (Supp. 1984) 2
§ 53-1-39, Mississippi Code of 1972 4

No. 84-1076

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,

Appellant,

vs.

THE STATE OIL AND GAS BOARD OF MISSISSIPPI AND COASTAL EXPLORATION, INC., ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE APPELLEE THE STATE OIL & GAS BOARD OF MISSISSIPPI

The Mississippi Legislature established the State Oil and Gas Board (the Board) in 1932 to aid in the conservation of natural resources and to encourage their development. Chapter 117 §§ 1-48, Miss. Laws of 1932. Although the Board had the authority to enforce well-spacing provisions, *California Company v. State Oil and Gas Board*, 200 Miss. 824, 27 So.2d 542 (1946), it was not until 1948 that it possessed the power to force nonconsenting owners into units of sufficient size to allow proper development. In 1948 the Legislature enacted a compulsory pooling law giving the Oil and Gas Board the power to integrate tracts into drilling units. Chapter 256, Mississippi Laws of 1948, § 53-1-5, Miss. Code of 1972 (Supp. 1983). Through successive legislation, the Board is cur-

rently vested with compulsory unitization powers, that is, to specify and recognize a common pool or source of supply in an oil and gas field. Chapter 365, Mississippi Laws of 1972, § 53-3-101, *et seq.*, Miss. Code of 1972 (Supp. 1984).

Consistent with its legislative mandates, the Oil and Gas Board of Mississippi is authorized to institute and enforce reasonable rules, regulations and orders to protect the established interests and correlative rights of the recognized owners of oil and gas in a common source of supply. In recognition of its responsibility to protect the interests and rights of *all* participants in a common unit, Chapter 301, Miss. Laws of 1970, § 53-1-17, Miss. Code of 1972, Rule 48 was issued by the Board in conformity with this mandate on November 19, 1951:

> Rule 48 Ratable Take.
>
> Each person now or hereafter engaged in the business of purchasing oil and gas from owners, operators or producers shall purchase without discrimination in favor of one owner, operator or producer against another in the same common source of supply.

"Rule 48" remained unchallenged for thirty (30) plus years. The fairness doctrine explicit in the rule was universally accepted. Pursuant to the Natural Gas Policy Act of 1978 (NGPA), natural gas wells producing from a strata in excess of 15,000 feet were classified as "deep, high cost wells" and, therefore, "deregulated" or exempt from price controls heretofore imposed. 15 U.S.C. § 3317 (c)(1). Contract price on this specified production was permitted to fluctuate with market demand.

Transcontinental Gas Pipe Line Corporation (Transco) is an interstate pipeline company which purchases natural gas from fields in Texas, Louisiana and Mississippi. The

pertinent facts of the contractual activities of Transco which gave rise to this appeal are accurately and succinctly represented in the opinion of the Mississippi Supreme Court, 457 So.2d 1298 (1984). J.S. App. A. At an irreducible minimum, the factual controversy may be stated thusly:

1. The Greens Creek Field and East Morgantown Field are two natural gas fields located in Marion County, Mississippi. Both fields are produced from the Harper Sand Gas Pool, and all wells in question were drilled below 15,000 feet. J.S. App. A, 8a.

2. Between 1978 and 1980, Transco entered into production contracts with various entities to the extent that its purchase of gas encompassed both the Green Creek and Morgantown fields. By 1982, Transco had approximately thirty-five (35) different contracts with various owners and producers. J.S. App. A, 8a-9a.

3. Under accepted unit-field practice, when a substantial producer-operator (one holding a significant gas production interest in the area) signed a contract with a purchaser, the owners of the smaller undivided interest which participated in the production unit were paid according to the provisions of that contract. J.S. App. A, 9a.

4. Because of market price fluctuations, Transco (effective July 1, 1982) notified its contracting producers that it, as purchaser, would no longer purchase gas from "non-contract producers". The provisions of outstanding contracts would, however, be honored. J.S. App. A, 11a. Prior to the July date, Transco had purchased and paid for all gas at the same price and on the same terms and conditions as it purchased and

paid its contract owners, operators or producers. J.S. App. A, 9a.

5. In effect, any and all producers who were unit producers and members of the conservation field would not be compensated for their previously recognized percentage interest in the gas pool. This practice ignored the equitable "taking" effect of Rule 48 of the Mississippi Oil and Gas Board; it amounted to continued production without just compensation. J.S. App. A, 14a.

6. Upon petition of the excluded non-contractual owners, the Oil and Gas Board ordered Transco to comply with its Rule 48, and ratably take from *all* owners, operators or producers in accordance to their calculable percentage of field and pool production without discrimination. J.S. App. A, 15a-16a.

As required by the applicable procedural statute, Transco appealed to the Circuit Court of the First Judicial District of Hinds County, § 53-1-39, Miss. Code of 1972, which affirmed the order of the Board. J.S. App. B, 59a.

The Supreme Court of Mississippi upheld the validity of Rule 48 of the State Oil and Gas Board. 457 So.2d 1298. In so doing, the Court discussed a number of federal constitutional issues presented by the appellants below: The Court found that federal preemption was not present since, as a matter of obvious fact, the subject matter in controversy was "deregulated gas", 15 U.S.C. § 3317(c)(1); and that the Federal Energy Regulatory Commission had no jurisdiction. Following the principles of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 884, 25 L.Ed.2d 174 (1970), that Court also determined that the regulation was not an impermissible burden on interstate commerce because it satisfied substantial local interests, *i.e.*, conservation and

protection of the correlative rights of the owners in an indiscriminate fashion.

The proposition that the regulation was void for vagueness was also dismissed by the Court in its decision, citing *Phillips Petroleum Co. v. Oklahoma,* 340 U.S. 190, 192, 71 S.Ct. 221, 222, 95 L.Ed. 204, 205-206 (1950), as was the argument that the "pro-rata" mandate amounted to an abuse of state police power.

This Court noted probable jurisdiction on March 25, 1985.

SUMMARY OF THE ARGUMENT

The existence and enforcement of Rule 48 "ratable take" provision recognizes that the property interests of *all* correlative owners, operators or producers must be protected. The Rule is a reasonable exercise of the police powers of the state to equitably protect the interest of all participants in a recognized common pool of, in this instance, natural gas. For, beyond question, one must first recognize the character of the natural resource sought to be regulated. *Ohio Oil Co. v. Indiana,* 177 U.S. 190, 202-211, 10 S.Ct. ....., 44 L.Ed. 729, 736-740 (1900). To permit capture of oil and gas and to pay only contracted producers to the exclusion of all other property owners who share in a common pool clearly amounts to an appropriation of a recognized property interest which, in and of itself, raises constitutional questions. *Ohio Oil Co., supra,* 177 U.S. 190, 211.

As a matter of commerce, the record of this appeal reflects that between 1978 and 1982, the appellant, Transco executed multiple contracts with various producers in a common natural gas pool in Marion County, Mississippi.

These corporate decisions were made with full knowledge of the deregulation provisions of the NGPA of 1978 and Rule 48 of the Mississippi Oil and Gas Board. As a result of NGPA, natural gas prices were no longer federally controlled at an artificially low level; free market price prevailed, the supply of gas soon increased, and the price for gas to be paid pipelines at the market place decreased.

As a result of market conditions in 1982, Transco sought to maintain its supply of natural gas from a certain common pool by only paying those producers then under contract, declining adequate pro rata compensation to non-contract pool participants. Mississippi regulation requires that all owners, operators or producers share in the production of a common pool.

Transco argues that Rule 48 of the State Oil and Gas Board is invalid because federal law has preempted State authority in this case. Transco also argues that such a regulation would be costly to them, raise the price of natural gas, and impede interstate commerce. This argument ignores reality. The Natural Gas Policy Act, specifically 15 U.S.C. § 3431(a)(1)(B)(i) and 15 U.S.C. § 3317(c)(1), excludes the gas pool in question from federal regulation. Under these circumstances, recent case authority permits reasonable state regulation, *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, ... U.S. ..... (No. 83-1925, 53 U.S.L.W. 4612, June 3, 1985); *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, ... U.S. ..... (Nos. 84-325 and 84-326, 53 U.S.L.W. 4616, June 3, 1985), particularly since the dictates of *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963) do not apply to deregulated natural gas.

Transco cannot argue that Rule 48 is an impediment to its business activities while participating in interstate commerce. It admits that the federal statute permits the passage of any price increase to the consumer, 15 U.S.C. § 3431(c). If we accept Transco's raw economic argument, without ratable take, some common pool participants would not be compensated for their recognized interest and the pool would eventually be drained. Rule 48 protects all parties; this state interest satisfies the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

ARGUMENT

I.

When the Price of Certain Natural Resources Was Deregulated As Provided by the Natural Gas Policy Act of 1978, 15 U.S.C. § 3431(a)(1)(B)(i), the Congress Ceded to the States, and in This Instance Mississippi, the Authority to Impose Its Regulations (Rule 48) to Prevent Waste and Drainage and to Protect the Rights of the Correlative Owners, Operators or Producers in a Designated Pool and/or Drilling Unit.

The appellants here challenge only the enforcement of Rule 48 of the Mississippi Oil and Gas Board as it applies to natural gas gathered and produced from a particular strata. According to the decision of the Mississippi Supreme Court, 457 So.2d 1298, 1313, their judgment was limited:

> A caveat. Today's facts and today's holding concern "deregulated gas". The Harper Sand Gas Pool lies

> at a depth of 15,000 feet below the surface of the earth. The wells in issue produce "high-cost natural gas", 15 U.S.C. § 3317(c)(1), . . .

It is from these undisputed facts and this judgment that appellee must begin its analysis and from this vantage point that the Court should begin its scope of review. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723, 102 S.Ct. 331, 78 L.Ed.2d 1090, 1097 (1984), fn. 7, citing *Black v. Cutter Laboratories*, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed. 1188 (1956).

Appellant argues that the Federal Energy Regulatory Commission preempts the Oil and Gas Board in regulating the gas production at issue. That proposition misses the mark. Either the language of the Natural Gas Policy Act of 1978 means what it says or it does not.

Appellee Oil and Gas Board agrees with the rationale of the State Supreme Court, 457 So.2d 1298, 1316:

> It is our reading of the Natural Gas Policy Act of 1978 that wellhead sales of the sort of gas with which we are here concerned have been effectively deregulated. We are concerned here with high cost natural gas, 15 U.S.C. § 3317(c)(1), which as a matter of law is no longer subject to FERC (formerly FPC) jurisdiction. 15 U.S.C. § 3431(a)(1)(B)(i). Congress has declared that the first sale of deregulated gas is never made subject to the Natural Gas Act or to FERC's jurisdiction under that act, and "dedicated gas" which is determined to be deregulated gas ceases to be subject to the NGA or FERC's jurisdiction under the NGA. With respect to this category of gas, the regulatory situation existing at the time *Northern Natural* was decided has thus been altered radically.

NGPA Section 601(a)(1)(A), (B) and (D), provide as follows:

> SECTION 601. COORDINATION WITH THE NATURAL GAS ACT-
>
> (a) JURISDICTION OF THE COMMISSION UNDER THE NATURAL GAS ACT.-
>
> (1) SALES.-
>
> (A) NATURAL GAS NOT COMMITTED OR DEDICATED-*For purposes of section 1(b) of the Natural Gas Act,* effective on the first day of the first month beginning after the date of the enactment of this Act, *the provisions of the Natural Gas Act and the jurisdiction of the Commission under such shall not apply to natural gas which was not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act* solely by reason of any first sale of such natural gas.
>
> (B) COMMITTED OR DEDICATED NATURAL GAS-Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, *for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act and which is-*
>
> (i) High-cost natural gas (as defined in Section 107(c)(1), (2), (3) or (4) of this Act); [Emphasis added].

The "Joint Explanatory Statement of the Committee on Conference" of the Congress, which accompanied the NGPA, makes clear what the conferees intended that Section 601(a)(1) accomplish.

> The conference Agreement limits the jurisdiction of the Commission under the Natural Gas Act in a manner similar to the House-passed bill. *Natural gas not committed or dedicated to interstate commerce as of the day before the date of the enactment of this Act is never made subject to the Commission's jurisdiction under sec. 1(b) of the Natural Gas Act. The Commission's jurisdiction under section 1(b) of the Natural Gas Act ceases on the first day of the first month beginning after the date of enactment of this Act for the following categories of natural gas: High-cost natural gas* which qualifies for deregulated price treatment under section 107(c)(1), (2), (3), or (4); [Emphasis added].

* * *

Section 601(a)(1) [15 U.S.C. § 3431(a)(1)] means what it says-the Natural Gas Act of 1938 (NGA) and FERC's jurisdiction under the Act *never* apply to deregulated gas, and certain other categories of gas. That message is decisive of the preemption issue in this case. The reason the Supreme Court voided the ratable take order in *Northern Natural* was because at that particular point in time such an order substantially affected gas which was subject to the FPC's (FERC's) jurisdiction under the NGA. If the NGA and FERC's jurisdiction under the NGA no longer extend to deregulated gas, and FERC has no authority to regulate the first sales and purchases of deregu-

lated gas either directly or indirectly, then *Northern Natural* does not dictate a preemption of otherwise existing state authority.

On June 3, 1985, in *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, ... U.S. ..... (No. 83-1925, 53 U.S.L.W. 4612, 4614), this Court again specifically affirmed the right of a state agency to regulate commercial activity when federal police power is absent:

> . . . "Where . . . the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones v. Rath Packing Co.*, 430 U.S., at 525 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230) (citations omitted). *Cf. Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) (deference to state regulation of safety under the dormant Commerce Clause); *id.*, at 681, n. 1 (Brennan, J., concurring in judgment) (same); *id.*, at 691 (Rehnquist, Jr., dissenting) (same). Of course, the same principles apply where, as here, the field is said to have been pre-empted by an agency, acting pursuant to congressional delegation. Appellee must thus present a showing of implicit pre-emption of the whole field, or of a conflict between a particular local prov ion and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.

Given the clear indication of the FDA's intention *not to pre-empt* and the deference with which we must review the challenged ordinances, we conclude that

these ordinances are not pre-empted by the federal scheme.

* * *

. . . To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal state balance embodied in our Supremacy Clause jurisprudence. See *Jones v. Rath Packing Co.*, 430 U.S., at 525.

The companion decision, *Metropolitan Life Insurance Company v. Commonwealth of Massachusetts*, ... U.S. ..... (Nos. 84-325 and 84-326, 53 U.S.L.W. 4616), stands for the same constitutional proposition as *Hillsborough County, supra.*

II.

The "Ratable Take" Provision of Rule 48 of the Oil and Gas Board of Mississippi Does Not Impede Interstate Commerce Because Its Operation Is Reasonably Calculated to Protect a "Legitimate Local Interest" - Fairness, That Is, to Insure an Appropriate Share fo Each Correlative Owner, Operator or Producer.

The dictates of the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), cannot be ignored, and there can be little doubt that the "legitimate local interest" was to protect all affected correlative owners, operators or producers from being excluded from an ongoing commercial transaction.

The true and entirely legitimate local interest here implicated is fairness. Rule 48 is a rule of equity.

The drainage phenomenon is a fact of life of natural gas production. *Shell Oil Company v. James,* 257 So.2d 488, 494-495 (Miss. 1971). The state through its Oil and Gas Board has acted in this and other ways to assure equity and fairness between and among the varying interests in a common source of supply. *See Phillips Petroleum Co. v. Millette,* 221 Miss. 1, 15-17, 72 So.2d 176, 179 (1954) (protection against loss through drainage required by fundamental notions of equity and justice).

We regard fairness as among the more noble purposes of the state. It is a fundamental component of the idea of justice. Rawls, *A Theory of Justice* (1971). That we are concerned here with the distribution of material and highly valuable resources does not denigrate or render less noble the state's duty to assure fairness between all persons affected. A laudable feature of Rule 48 in the present context is that it applies to owners of interests in the common source of supply without reference to whether they be Mississippians. Getty is entitled to the same fair treatment as is Coastal as are the Fairchilds as is Tomlinson and as is Inexco and so forth.

> *Transcontinental Gas Pipeline v. State Oil and Gas Board,* 457 So.2d 1298, 1321 (1984).

This Court recognized that "ratable take" is a necessary protection device (state regulation) in *Ohio Oil Co. v. Indiana,* 177 U.S. 190, 210, 10 S.Ct. ....., 44 L.Ed. 729, 739 (1900). While defining the nature of natural gas, that opinion stated:

> . . . But there is a coequal right in them all to take from a common source of supply the two *substances which in the nature of things are united, though separate. It follows from the essence of their right and

> from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste.

Cited with approval, Energy Reserves Group, Inc. v. Kansas Power & Light Company, 459 U.S. 400, 419, 103 S.Ct. 697, 74 L.Ed.2d 569, 586 (1983).

Further, the commercial problems of Transco were of its own making. 457 So.2d 1298, 1322.

> Many important provisions of that contract reflect that the parties carefully considered future eventualities. The so-called take-or-pay provision obligating Transco to pay whether it takes the production made available by Getty is one such clause. Transco's problem is that it failed to protect itself against the market glut and declining prices consumers are willing to pay for natural gas. It is not now and never has been the function of this Court to relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated. *Bunting v. Orendorf,* 152 Miss. 327, 332, 120 So. 182, 183 (1929); *Jamison v. McDaniel,* 25 Miss. 83, 86 (1852); *Gulf Oil Corp. v. Federal Power Commission,* 563 F.2d 588, 598-600 (3d Cir. 1977).

If Rule 48 is not enforced, the real injured party is the unprotected owner, operator or producer. Transco has the right to pass the costs it incurs in producing or transporting natural gas through to the consumer. 15 U.S.C. § 3431(c).

CONCLUSION

Initially, the claims of Transco must be put in perspective. The issue is entirely confined to the Board's order concerning the Harper Sand Gas Pool which lies below 15,000 feet and in which the wells in question produce "high-cost" natural gas which is unregulated pursuant to 15 U.S.C. § 3317(c)(1) and 15 U.S.C. § 3431(a)(1)(B)(i). No other fields, pools, and/or wells are involved in this appeal.

The State has not attempted to tell appellant how much gas to take or what it should pay for the gas. To the contrary, the Order only provides that if Transco decides to take any gas, it must do so ratably.

For the foregoing reasons, the judgment of the Supreme Court of the State of Mississippi should be affirmed.

Respectfully submitted,

EDWIN LLOYD PITTMAN, Attorney General
State of Mississippi
ED DAVIS NOBLE, JR.
Assistant Attorney General
R. LLOYD ARNOLD
Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680
Attorneys for the State Oil and Gas Board of Mississippi